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in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

NO. _____

JOHN CLARENCE COOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, JOHN CLARENCE COOK, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, dated June 1, 1972; the Order Denying Petition for Re-Hearing, dated June 29, 1972; and the denial of Petitioner's Motion for Remand for Evidentiary Hearing dated July 18, 1972.

OPINIONS BELOW

The judgment of the United States District Court for the Southern District of Florida was rendered on June 9, 1971, and on said date the Petitioner was sentenced to a term aggregating 12 years and fines aggregating $30,000.00.

The decision and opinion of the United States Court of Appeals for the Fifth Circuit was entered on June 1, 1972; such opinion has not as yet been reported, but a copy of said opinion is attached hereto as Appendix B. Petition for Re-Hearing (Appendix C) was denied on June 27, 1972. Motion for Remand for Evidentiary Hearing (Appendix D) was denied on June 18, 1972 (Appendix E).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

Jurisdiction is also invoked under Rule 19(1)(b) of the Rules of the Supreme Court of the United States adopted June 12, 1967, effective October 2, 1967, because a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter, or has decided a federal question in a way in conflict with applicable decisions of this Court, and has decided an important question of federal law which has not been, but should be, settled by this Court.

QUESTIONS PRESENTED

(1) WHETHER PETITIONER WAS DENIED HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE, CONTRARY TO A COURT-APPROVED STIPULATION ENTERED INTO BY ALL PARTIES PRIOR TO THE COMMENCEMENT OF TRIAL PROCEEDINGS, THE TRIAL COURT, *SUA SPONTE*, THEREAFTER DIRECTED THE ADMISSION OF TESTIMONY (CONCEDEDLY PREJUDICIAL) WHICH INCULPATED PETITIONER'S OWN COUNSEL AS A PARTICIPANT IN ONE OF THE OVERT ACTS CHARGED IN THE INDICTMENT.

(2) WHETHER PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL IN CONTRAVENTION OF HIS FIFTH AMENDMENT CONSTITUTIONAL RIGHT OF DUE PROCESS, WHERE THE TRIAL COURT *SUA SPONTE* ABROGATED A PRE-TRIAL COURT-APPROVED STIPULATION RESTRICTING THE INTRODUCTION OF EVIDENCE KNOWN AND ACKNOWLEDGED TO BE MATERIALLY PREJUDICIAL TO PETITIONER.

(3) WHERE THE RECORD DEMONSTRATES THE COMPLETE ABSENCE OF ANY KNOWING AND/OR INTELLIGENT WAIVER OF PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND THE FURTHER LACK OF ANY JUDICIAL INQUIRY WITH RESPECT THERETO, CAN WAIVER OF SUCH FUNDAMENTAL RIGHT BE IMPLIED SOLELY THROUGH THE PROPER EXERCISE OF PETITIONER'S CONCOMITANT SIXTH AMENDMENT RIGHT TO SUMMON A NECESSARY AND MATERIAL WITNESS IN HIS BEHALF.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

(1) Title 28, U.S.C. Section 1254(1)

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

(2) Rule 19(1)(b) Rules of Supreme Court of the United States

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state

> or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

(3) The Fifth Amendment, United States Constitution.

(4) The Sixth Amendment, United States Constitution.

STATEMENT OF THE CASE

Petitioner JOHN CLARENCE COOK was indicted in four counts of a nine-count indictment which jointly charged him and seven co-defendants with conspiring to burglarize post offices and to receive, possess and sell property (postage and savings stamps) stolen from the United States, and separately charged Petitioner in three substantive counts of possessing and concealing such property, in purported violation of Title 18, U.S. Code Sections 371, 641 and 2115.

Of the original eight individuals charged in the indictment (App. A), only the Petitioner and co-defendants Rick Chapman and Roy Renderer proceeded to trial. Prior thereto, three of the defendants charged, i.e., Jimmy Jack Holmes, William Allison and Otto Powers, entered pleas of guilt as to the conspiracy count; one of the defendants,

i.e., Herman Gordon, had died, and the remaining defendant, Marianne Cook, was granted a severance and dismissal.

At the conclusion of the Government's case, the trial court directed verdicts of acquittal on the conspiracy charge as to the co-defendants Chapman and Renderer. Thereupon, Petitioner and each of such co-defendants moved for separate trials as to the remaining and *unrelated* substantive counts charged in the indictment, which motions were denied by the trial court.

The trial jury returned verdicts of guilt as against the Petitioner on both the conspiracy count and the three substantive counts charged against him in the indictment. The Court thereafter entered an adjudication of guilt as to each of such counts, and sentenced Petitioner thereon to an aggregate of 12 years imprisonment and an aggregate fine of $30,000.00.

The Petitioner thereupon entered an appeal to the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the trial court (Appendix B). Thereafter, petitioner filed his Petition for Re-Hearing (Appendix C) and Motion for Remand for Evidentiary Hearing (Appendix D), which were denied by such Circuit Court.

The facts giving rise to the issues circumscribed by the within Petition are as follows:

The undisputed evidence adduced at trial reflected that all of the burglaries of the various United States Post Offices referred to in the indictment were committed by the

co-defendants Holmes and Allison and others not named as defendants in the cause. Following one of such burglaries, i.e., the burglary of the Azalea Park branch post office located in Orlando, Florida, the co-defendants Holmes and Allison transported the proceeds thereof to Petitioner's residence in Miami, Florida, in the company of a fellow-burglar, Willie Urquhart.

Upon arrival, the co-defendants Holmes and Allison took such proceeds, contained in a footlocker, into Petitioner's residence, while Urquhart remained outside in a car. Shortly thereafter, a police car arrived and arrested Urquhart, while the co-defendants Holmes and Allison remained in Petitioner's residence purportedly observing such arrest through a window.

After such arrest and departure of police, Petitioner's trial counsel, Louis Vernell, in response to Petitioner's telephone call, arrived at Petitioner's home accompanied by an unidentified girl and a male client, i.e., Ralph Harrington. While the girl and Harrington remained in the car, Petitioner's said counsel entered Petitioner's residence and shortly thereafter left with the co-defendants Holmes and Allison.

After driving a short distance, Vernell's vehicle was stopped by the police and he, the girl, Harrington, Holmes and Allison were subjected to interrogation and demands for identification. Only Vernell and Harrington produced such identification, and purportedly, upon the advice of Vernell, the co-defendants Holmes and Allison refused to do so. After possibly one hour, all of such individuals were allowed to leave without charges being made and/or proffered against any of them. Thereupon, Vernell drove the

girl and Harrington to a restaurant and then took the co-defendants Holmes and Allison to a motel for the night. For his services and efforts in their respective behalf, Holmes and Allison paid Vernell the sum of $500.00.

Thereafter, Vernell represented Willie Urquhart on the charge for which he was arrested, i.e., disorderly conduct, and gained an acquittal on such charge.[1]

Shortly prior to Petitioner's trial, it was disclosed that the co-defendants Holmes and Allison, who had previously pled guilty to the conspiracy count of the indictment, would testify in the cause as Government witnesses against Petitioner. All parties then became immediately aware of the extreme prejudice which would be occasioned through the possible disclosure by such witnesses at trial of Vernell's purported participation in the aforementioned overt acts, especially since Vernell was appearing in the cause as trial counsel for Petitioner.

Ergo, at the outset, such matters and purported participation of Vernell were brought to the attention of the trial judge. Thereupon, and for the *sole* purpose(s) of avoiding a continuance of the trial to engage other counsel for Petitioner, and to otherwise obviate any possibility for a mistrial, the parties, in open court, entered into a stipulation with the approval of the trial judge. As stipulated, none of the Government witnesses would mention Vernell

[1]All of the matters herein related concerning the activities of Vernell were received in evidence. It was also charged by Government counsel during trial proceedings that Vernell was alleged to have been aware of the presence of contraband while he was in the Cook residence, and that he had knowledge of the full circumstances thereof. Because of the stipulation entered into between the parties, *infra*, Vernell was unable to testify or otherwise refute such charges and accusations.

during trial proceedings. In consideration for such limited stipulation, Vernell agreed to waive any right to testify in the cause. The entire scope of such stipulation is reflected in Appendix F, which constitutes an excerpt of proceedings conducted prior to the actual commencement of the trial.[2]

All parties thereafter complied with the Court-approved stipulation in both their direct and cross-examination of the witnesses testifying in the cause. However, during presentation of Petitioner's case in chief, the Petitioner called Ralph Harrington as a witness, who thereupon testified as to matters occurring in his presence and to conversations overheard by him between the co-defendants Holmes and Allison while in Vernell's vehicle; such testimony served to impeach Holmes' testimony.

Similar to the cautionary instructions provided to the Government witnesses Holmes and Allison (per stipulation), Harrington refrained from any mention of Vernell, and, in lieu thereof, referred to such individual as "the party who I was with." During direct examination, the *trial judge* questioned such witness as to the name of the individual referred to. Immediately, objections were made and a sidebar conference held, whereupon the trial judge excused the jury for further argument.

During such argument, the trial judge weighed the impact of Vernell's alleged involvement (and prejudice to Petitioner) and, indeed, suggested Vernell's own criminal liability. Addressing Petitioner's counsel, the Court stated (Appendix G):

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[2]Such stipulation made absolutely no reference to either the unnamed girl or Harrington, *nor were any restrictions imposed upon either the Government or the defense to call such individuals as witnesses in the cause.*

"THE COURT: And whether you knew it or not, you certainly were aware that they were men that Cook did not call the police to remove, if they were intruders in his home or unwelcome guests, but got his attorney in there to remove them under circumstances which I am frank to say, Mr. Vernell, are strongly indicative of the fact that as his counsel, whether wittingly or unwittingly, you were participating in spiriting away from possible discovery by the police two men who were certainly, from the evidence before me, criminals and recidivists of a very marked degree, and the aroma is not good.

MR. VERNELL: Your Honor, if I may, to correct the aroma and inference, I never saw those men before that night. I never saw them, and I did not even know their names.

THE COURT: Now, look, there is no use going into this, because we cannot go into the confidential conversations had between you and Cook, as counsel and client.

MR. VERNELL: Yes, sir.

THE COURT: But we are not stupid. We know Mr. Cook, if these were uninvited or unwelcome guests, would have called the police and said, 'I've got two bums' or two something, 'in my house. They won't get out. Come get 'em.' But he called you, his attorney.

> Now, you do not call an attorney in these circumstances to get somebody away from your house, unless it is something that you would much prefer the police would not know about; and whether unwittingly or not, it appears to me that you lent yourself to aiding the enterprise of getting these men away from the Cook house before they were either detected in the Cook house by the police, or detected by the police when emerging from the Cook house."

Over the repeated objections of all defense counsel, the trial judge directed that Harrington disclose the name and presence of Vernell to the jury. Each of the defense counsel thereupon moved for a mistrial, which was denied by the trial court.[3]

Upon the resumption of trial proceedings, Harrington, under the direction of the Court, fully revealed the identity and participation of Vernell in connection with the subject overt acts. Thereafter, the trial court, again over the objection of all defense counsel, permitted the recall of the co-defendant Holmes, who wrongfully testified that his previous failure to mention the name of Vernell was *not* because of any stipulation between the parties, but to avoid "undue embarrassment to Vernell." (App. H).

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[3]Significantly, prior to such occurrence and during the direct examination of the Government witness Holmes, a similar situation occurred in which the trial judge asked such witness the name of the individual who had driven him away from Petitioner's residence on the night in question. Upon being reminded of the stipulation, the trial judge immediately withdrew such question and any further inquiry along such lines.

To compound the prejudice to Petitioner, the trial judge on two occasions, i.e., during Harrington's examination and again in its closing instructions, erroneously charged the jury that the failure of the Government witnesses Holmes and Allison to make reference to Vernell was to save such counsel from embarrassment (App. G). Though requested by Petitioner's counsel, the trial court refused to publish the actual stipulation of the parties.

Following Petitioner's conviction, and in the course of appellate review by the United States Court of Appeals, the Petitioner filed a motion to remand the cause for evidentiary hearing for the purpose of determining: (a) Whether the Petitioner at any time knowingly or intelligently waived his constitutional right to the effective assistance of counsel, and (b) whether Petitioner or his counsel violated the court-approved stipulation in calling Harrington as a witness in the cause. (App. D).

In support of such motion, Petitioner attached thereto the affidavits of all (four) defense counsel present at, and who participated in, the court-approved stipulation, i.e., Harvey StJean, Donald Bierman, George Gold and Louis Vernell. Upon oath, each of such counsel stated: (a) That the subject stipulation did not preclude Petitioner's calling of Harrington as a witness in the cause; (b) That Petitioner had not in anywise violated such stipulation; and, (c) That the disclosure of Vernell's identity and presence had an extremely prejudicial effect upon the jury's deliberation and the outcome of the cause.

Further appended to such motion for remand was the affidavit of Petitioner, which reflected: (a) That he would not have continued with Vernell as trial counsel

without entry into the subject stipulation and full adherence thereto by all parties; (b) That he at no time waived his right to the effective assistance of counsel and that no judicial inquiry as to the same was ever made by the trial court; and, (c) That by reason of the trial court's abrogation of the subject stipulation, the Petitioner felt prejudiced, rather than benefited, from the presence of Vernell as his trial counsel.

Upon denial of such Motion for Remand and the entry by the Circuit Court of its opinion affirming the judgment of the trial court, the Petitioner herein respectfully submits the within Petition for Writ of Certiorari, and the cause is thus presented before this Honorable Court.

FEDERAL JURISDICTION

Federal jurisdiction in the first instance is based upon alleged violations of Title 18, U.S. Code, Sections 371, 641 and 2115.

ARGUMENT

REASONS FOR GRANTING THE WRIT

The decisions and opinion as rendered by the Circuit Court of Appeals, Fifth Circuit, in the case at bar, should be reviewed by this Honorable Court for the following reasons:

I — The Necessity and Propriety of the Pre-Trial Stipulation of the Parties.

Prior to the commencement of trial proceedings, both the within Petitioner and his trial counsel were confronted with a dilemma. Through discovery process and advice imparted by the Government prosecutor, it was ascertained that two of the co-defendants charged in the same indictment with Petitioner had not only pled guilty to the conspiracy count, but intended to testify as witnesses for the Government in the prosecution of the Petitioner. It was further revealed that the testimony of such individuals would encompass activities and knowledge on the part of Petitioner's trial counsel of an inculpatory nature, and would otherwise serve to directly link such counsel to certain of the overt acts charged against Petitioner (Statement of the Case, *supra.*)

It was accordingly obvious that the receipt of such testimony would not only emasculate the effectiveness of Petitioner's trial counsel, but would otherwise materially prejudice him at trial.

Ergo, to avoid a continuance of trial in order to engage other counsel for Petitioner, and to otherwise obviate the possibility of a mistrial, it was agreed that such Government witnesses would refrain from mentioning either the name or participation of Petitioner's counsel in connection with any overt act charged.

Such agreement was formulated into a stipulation entered into at the commencement of trial proceedings, and the same received the full accord of the trial judge (Appendix F). In *sole* consideration for such stipulation, Petitioner's trial counsel agreed not to take the stand.

Clearly, the purpose and intention of such stipulation, as well as the terms and conditions thereof, were the proper subject of agreement between the parties and enforceable by the trial court.

Stipulations between parties as to evidence and matters concerning the conduct of trial proceedings are not only favored by the courts, but are deemed to be "controlling and conclusive and courts are bound to enforce such stipulations." *Burstein v. U.S.*, 232 F.2d 19, 22 (8th Cir. 1956).

Significantly, in *Bradley Co. v. Local Union No. 3*, 51 F.Supp. 36 at 40 (S.D.N.Y. 1943), the Court held that it was "wholly without power to nullify or deprive either party of the effect of the stipulation or of the order."

In *Morse Boulger Destructor Co. v. Camden Fibre Mills, Inc.*, 239 F.2d 282 (3rd Cir. 1956), the court held that even if a stipulation had been inadvertently, inadvisedly or improvidently entered into, the only relief which the Court could grant, except to honor the stipulation, would be to have placed the parties into a position of status quo before the stipulation.

In the case at bar, the presence of Vernell as trial counsel would have made it impossible to restore the parties to a position of status quo without the declaration of a mistrial and a consequent new trial, wherein other counsel would necessarily be employed to represent the interest of the within Petitioner.

In *Laird v. Air Carrier Engine Service, Inc.*, 263 F.2d 948 (5th Cir. 1959), the Court therein required that before

a stipulation could be dishonored, full protection would first have to be provided to prevent the occurrence of prejudice to either party. In so determining, such Court held:

> "The Court does have the right, and it should never fail to exercise it, to relieve counsel of stipulations to prevent manifest injustice. But the Court is responsible for seeing that suitable protective terms or conditions are imposed to prevent substantial and real harm to the adversary. What those terms or conditions might be no one can forecast. In one case it might be a continuance. In others it might be the making of a new stipulation to permit the receipt in evidence of data or material or statements now relevant and trustworthy, but lacking in some technical admissibility. *Whatever form it takes, the protection must be as full as needed to assure that the authorized change does not subject the adversary to irreparable and irretrievable harm.*" (953)

No protection was provided to either the Petitioner or his trial counsel and both were left exposed and without opportunity to respond to the damaging and prejudicial effect which could reasonably be inferred from the admission of testimony linking Vernell with overt acts charged against Petitioner.

Significantly, the record reflects no reasonable predicate for the trial court's abrogation of the stipulation of the parties, nor does the rationale suggested by the trial judge in anywise justify the same and the consequent extreme prejudice to Petitioner. Certainly, in proffering the testimony of Ralph Harrington, neither Petitioner nor his counsel in anywise violated the stipulation of the

parties and even the trial court noted that such witness took meticulous care not to identify Petitioner's counsel as the driver of the vehicle of which he was an occupant.

It is likewise clear that the testimony of such witness was material and indispensable to Petitioner, and that the matters elicited in his testimony were clearly admissible. Indeed, to have limited the examination of such witness, or to have otherwise precluded his testimony would, in itself, have constituted an unconstitutional denial of Petitioner's right to a fair and impartial trial and to present witnesses in his behalf, in contravention of the Fifth Amendment to the Constitution of the United States.

It is accordingly inconceivable that the calling of such witness, could be considered as a violation, or a cause for the violation, of the court-approved stipulation, as suggested by the Circuit Court in the case at bar. The error of such finding is apparent in considering that all defense counsel participating in the subject stipulation, fully concurred in, and otherwise acknowledged, the propriety of the actions of Petitioner's trial counsel and, in affidavits filed before such court (App. D), each of such counsel stated that it was never their respective understanding that the subject stipulation

> "would and/or could restrict testimony of events following the departure of Holmes and Allison from the Cook residence (the overt act in which Vernell allegedly participated), nor was it your Affiant's understanding that such stipulation would preclude the calling of a witness by any party to testify as to matters related thereto."

In the case at bar, both the Government as well as the defense must be presumed to have been aware of all

matters and facts circumscribed by the subject stipulation. Indeed, the record demonstrates that the presence and participation of both Harrington and the aforementioned girl were well known to the prosecution months prior to the commencement of trial.

Ergo, to preclude any party from calling such witnesses by reading into the subject stipulation matters not embraced therein would be manifestly unfair and unwarranted.

Clearly, each of the parties had an absolute right to both insist and rely upon the enforcement of the subject stipulation. In his own affidavit (App. D), the Petitioner unequivocally stated that without such stipulation he would not have continued with Vernell as trial counsel. The significance of such affidavit is clear in noting that at no time during trial proceedings did the trial court provide any opportunity to Petitioner to engage other counsel.

It is accordingly submitted as not only being improper, but WRONG, that the stipulation could be considered fair to the Government when it was entered into, but unfair when enforcement became necessary.

Albeit, considerations of "fairness to the Government" and unsupported "impressions" as alluded to by the Circuit Court (App. A) cannot possibly serve to balance the manifest prejudice to the Petitioner through the abrogation of the trial court's own court-approved stipulation of the parties. Under the circumstances presented in the case at bar, the violation of such stipulation can only be considered as tantamount to a denial to Petitioner of a fair and impartial trial in contravention of his Fifth Amendment constitutional right to due process.

II — The Constitutional Guarantee of Right to Counsel.

In *Glasser v. United States*, 315 U.S. 60 (1942), this Honorable Court alluded to the importance of one's right to counsel as guaranteed by the Sixth Amendment, and held as follows:

(69) "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the Assistance of Counsel for his defence'. 'This is one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty' and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. Johnson v. Zerbst, 304 U.S. 458, 462, 463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461."

The importance of such right was otherwise stated in *Steadman v. Duff*, 302 F.Supp. 313 (M.D. Fla. 1969), as follows:

"More than any other right guaranteed by the Bill of Rights regarding the function of justice, the right to counsel is paramount, for it is the medium through which all other guarantees are made a reality."

III — The Guarantees Accorded by the Sixth Amendment Require the Effective Assistance of Counsel.

It is significant to note that the mere presence of counsel does not, per se, satisfy the constitutional guarantee of one's right to counsel. In order to fully satisfy such constitutional requirement, effective representation and assistance is a prerequisite.

Such distinction was aptly expressed in *Goodson v. Peyton*, 351 F.2d 905 (4th Cir. 1965), where such court held:

> "The federal constitution guarantees to persons accused of crime in state courts the right to representation by a lawyer. The constitutionally protected right is not satisfied by formalisms; the right is to effective representation." . . . "A lawyer forced, or attempting, to serve masters with conflicting interests cannot give to either the loyalty each deserves."

In considering the prerequisites of effective assistance of counsel, this Honorable Court, in *Glasser v. United States, supra*, admonished that:

(70) ". . . Assistance of Counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired . . ." "If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."

Where conflict of interests is demonstrated, *as between multiple clients* represented by a single attorney, the courts have consistently determined the same to con-

stitute a denial of effective assistance of counsel, and sufficient to require reversal. *Campbell v. United States*, 122 U.S. App.D.C. 143 (1965), 352 F.2d 359; *Case v. State of North Carolina*, (4th Cir. 1963), 315 F.2d 743; *Craig v. United States*, (6th Cir. 1954), 217 F.2d 355.

Certainly, such principle requires even more rigorous application where the conflict is shown to exist *between the attorney and the client himself*. *U.S. v. Gougis*, 374 F.2d 758 (1967); *Tucker v. United States*, 235 F.2d 238; *Zurita v. United States*, 410 F.2d 477 (1969).

In *Tucker, supra*, the court held it to be sufficient to constitute a denial of counsel that:

> "Because of a prior attorney-client relationship with the bank manager and the possibility that this witness might again be a paying client, Tucker was denied his constitutional right to counsel." (Page 240)

Similarly, in *Zurita, supra*, the court held that allegations regarding defense counsel's business connection with the allegedly robbed bank entitled petitioner to an evidentiary hearing on his motion to vacate sentence, as the allegations might, if true, demonstrate a denial of effective counsel. The court therein stated:

> "[H]is [defendant's] right to counsel under the Constitution is more than a formality, and to allow him to be represented by an attorney with such conflicting interests as existed here without his knowledgeable consent is little better than allowing him no lawyer at all."

> "Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; Goodson v. Peyton, (4th Cir.), 351 F.2d 905. 40 Ill.2d at 112, 113, 239 N.Ed.2d at 443."

Certainly, severe apprehension and concern was necessarily felt by Petitioner's counsel following the Court's *sua sponte* abrogation of the stipulation. Thereafter, and for the remainder of the trial, Petitioner's counsel was subjected to the continued threat of not only having his own integrity impugned, but to suffering the disquieting fear of being wrongfully inculpated in the commission of the crime itself.

Under such circumstances, the anxiety, fear and concern of Petitioner's counsel precluded Petitioner from the unfettered and unhobbled representation to which he was constitutionally entitled, and otherwise served to emasculate the effectiveness of his counsel.

Needless to state, to impugn and otherwise impair the integrity and credibility of one's counsel serves only to emasculate his effective assistance during trial proceedings. In *United States v. Puco*, (2nd Cir. 1971), 436 F.2d 761, the prosecutor, through his method of questioning, placed at issue his own credibility. The Court in such instance deemed the same to be so prejudicial as to make requisite a reversal and consequent new trial. The Court therein held:

> "We find this contention of appellant that prejudicial error was injected here well taken. Using this statement, which was never admitted into

> evidence against either defendant, in this way in effect placed the credibility of the prosecutor himself before the jury and was therefore highly prejudicial."

Indeed, not only was the integrity and credibility of Petitioner's trial counsel besmirched in consequence of the prejudicial and onerous testimony adduced, but in his own evaluation of the same, the trial judge virtually accused such counsel of unlawful activity (App. G), i.e.,

> "THE COURT: And whether you knew it or not, you certainly were aware that they were men that Cook did not call the police to remove, if they were intruders in his home or unwelcome guests, but got his attorney in there to remove them under circumstances which I am frank to say, Mr. Vernell, are strongly indicative of the fact that as his counsel, whether wittingly or unwittingly, you were participating in spiriting away from possible discovery by the police two men who were certainly, from the evidence before me, criminals and recidivists of a very marked degree, and the aroma is not good."

Under such circumstances, the Petitioner must be said to have been deprived of the "effective, competent and adequate representation" essential to his right of counsel. *Wilson v. Phend*, 417 F.2d 1197 (7th Cir. 1969).

IV — In the Absence of Waiver or Judicial Inquiry With Respect Thereto, Petitioner was Constitutionally Entitled to Effective Assistance of Counsel.

Although the Circuit Court in the case **sub judice** conceded both the abrogation of the court-approved stipulation and the consequent prejudice to Petitioner, it nonetheless held the same not to constitute reversible error, upon the theory that the Petitioner had knowledge of such possible conflict and thus waived his constitutional right to unfettered counsel with undivided loyalty. Such court held on pages 11 and 12 of its opinion:

> "In the instant case, however, Cook was fully aware of his attorney's involvement and the prejudice that might flow from revealing such facts to the jury. In spite of this, he expressed a desire that Vernell continue to represent him. We do not believe that such a conscious choice by Cook, with full knowledge of the possible conflict, coupled with a tactical mistake by the defense which made this possibility of conflict a reality, can warrant a mistrial, or a reversal here."

The difficulty with the Court's opinion and holding in this regard is that although the record demonstrates that the Petitioner had knowledge of the basic facts which caused the conflict, the record does not demonstrate that the Petitioner was sufficiently aware of the ramifications of such facts as to justify a knowing waiver of his constitutional right to effective assistance of counsel, *nor were such matters even inquired into by the trial court.* To the contrary, the Petitioner's desire that his counsel continue in the trial of his cause was *expressly conditioned* upon

adherence to the stipulation which was entered into by the parties and approved by the trial court, prior to the commencement of the trial. How then can Petitioner be said to have been aware of the consequences which, through compliance with the stipulation, could never have happened or have otherwise been occasioned?

It is clear that the Circuit Court "presumed" or otherwise "inferred" waiver on the part of Petitioner herein. It is suggested, however, that any such presumption or inference is impermissible.

Where the waiver of one's constitutional right to effective assistance of counsel was at issue, this Honorable Court has consistently decried the propriety of any presumption in favor thereof. In *Glasser v. United States, supra,* it was held:

(70) "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree, as the offenses dealt with increase in gravity.' Patton v. United States, 281 U.S. 276, 312, 313, 50 S.Ct. 253, 263, 74 L.Ed. 854, A.L.R. 263. *The trial court should protect the right of an accused to have the assistance of counsel. 'This protect-*

> *ing duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.* While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461."

Significantly, this Court found in such case that even though Glasser was an attorney, the record did not demonstrate an intelligent and competent waiver by him.

The analogy in *Glasser* is even more apparent where this Court alluded to the necessity on the part of the trial judge "to reascertain Glasser's attitude" when conflict became apparent after the commencement of his trial. As in the case at bar, the trial judge in Glasser was aware at the outset of the possibility of conflict, and rather than protecting Glasser's rights, this Honorable Court determined that the trial judge was responsible for the creation of the situation which resulted in the denial thereof. This Court's opinion in *Glasser* went on to say:

(70) "No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. *The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of*

those rights. For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the court. Kretske said the appointment could be accepted 'if your Honor wishes to appoint him (Stewart)', and Stewart immediately replied: 'As long as the Court knows the situation. I think there is something in the fact that the jury knows we can't control that.' *The court made no effort to reascertain Glasser's attitude or wishes.* Under these circumstances to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

In accordingly considering that the possibility of prejudice to Glasser under such circumstances was sufficient to warrant a reversal, this Court further stated:

(75) "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.* Cf. Snyder v. Massachusetts, 291 U.S. 97, 116 54 S.Ct. 330, 336, 78 L.Ed. 674, 90 A.L.R. 575; Tunney v. Ohio, 273 U.S. 510, 535, 41 S.Ct. 437, 445, 71 L.Ed. 749, 50 A.L.R. 1243; Patton v. United States, 281 U.S. 276, 292, 50 S.Ct. 253, 256, 74 L.Ed. 854, 70

A.L.R. 263. And see McCandless v. United States, 298 U.S. 342, 347, 56 S.Ct. 764, 766, 80 L.Ed. 1205. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser."

Similarly, in *Johnson v. Zerbst*, 304 U.S. 458, 463, 464, 58 S.St. 1019, this Court held:

"The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.

"There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that '*courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.* The determination of whether there has been an intelligent waiver

of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.

* * *

"The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

In applying the principles of *Glasser* and *Johnson*, *supra*, it is noted that in the case at bar the record not only negates the presence of any waiver, but affirmatively demonstrates the complete absence thereof. In accordingly alluding to Petitioner's Motion for Remand (App. D), which was filed in response to the Circuit Court's "presumption" of waiver, the attention of the Court is directed to the sworn affidavits of four trial counsel, as well as the Petitioner himself, which clearly reflect that no judicial inquiry was made by the trial court at any time as to Petitioner's "acquiescence to the loss of [sic] such fundamental rights." The trial court further failed to determine whether Vernell adequately apprised his client of the possible loss of effective assistance of counsel due to abrogation of the subject stipulation.

While conceding the awareness of Petitioner as to the presence of Vernell in his home, the record is barren of any evidence which could even suggest that the Petitioner had knowledge of any of the following prejudicial matters elicited during trial proceedings: (1) That Petitioner's counsel drove the co-defendants Holmes and Allison to a motel following their departure from the Cook residence; (2) That such co-defendants paid Vernell the sum of $500.00 for his services and efforts; and, (3) That Petitioner's counsel thereafter represented Urquhart in a criminal proceeding.

In the case of *Lollar v. United States*, 376 F.2d 243 (C.A.D.C. 1967), where the defendant was granted a new trial when it was determined that he had waived his objection to a single attorney representing multiple defendants, the court stated:

> "... when two defendants appear with a single attorney *it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks.* Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the *affirmative* [Court's emphasis] determination that co-defendants have intelligently chosen to be represented by the same attorney ..." (Page 245)

The importance of the role of the trial judge in any determination of a waiver of one's constitutional right is underscored in *Crawford v. Rodriguez*, 373 F.2d 22 (10th Cir. 1967):

"The burden upon the trial judge to assure that a defendant's waiver of counsel is intelligently and understandingly made is outlined in *Shawan v. Cox*, 350 F.2d 909 (10th Cir. 1965): 'He must investigate to the end that there can be no question about the waiver, which should include an explanation of the charge, the punishment provided by law, any possible defenses to the charge or circumstances in mitigation thereof, and explain all other facts of the case essential for the accused to have complete understanding.' "

Such principle was otherwise stated in *McConnell v. United States*, 375 F.2d 905 (5th Cir. 1967), as follows:

(910) "In determining whether there is a competent, informed and intelligent waiver, the judge before whom an accused appears without counsel is charged with a serious responsibility which cannot be perfunctorily performed."

Certainly, in light of the court approved stipulation, the Petitioner could reasonably have concluded that any possible prejudice resulting from his attorney's conflicting interest was fully obviated. Clearly, no waiver can be demonstrated or otherwise inferred from such facts.

Consequently, the only time the issue of waiver could have been considered of moment in the instant case was upon the trial court's abrogation of the stipulation of the parties. On such occasion, however, no waiver, either express or implied, is demonstrated in the record.

In considering the effect of a change in circumstances occurring after a trial has commenced, upon the issue of waiver, the court, in *Craig v. United States*, 217 F.2d 275 (6th Cir. 1954), held:

(359) "We think it follows from the foregoing findings that although Craig was in no way 'deprived' of his right to independent counsel of his own choosing by any act of the District Judge or District Attorney, nevertheless, by reason of a combination of circumstances, not reasonably foreseeable by Court or counsel, he did not receive the effective assistance of counsel to which he was entitled under the Sixth Amendment, and that under the particular circumstances of this case he did not intelligently and voluntarily waive such right."

* * *

"Failure on the part of the accused to properly and timely assert his right may be excusable under certain conditions and not constitute a waiver."

Certainly, silence on the part of an accused is neither tantamount to, nor otherwise infers, waiver. In *United States Ex Rel. Williamson v. Lavaller*, 282 F.Supp. 968 (E.D.N.Y. 1968), such court held:

"In the instant case, petitioner did not learn of the conflict until during the trial, and may not be said to have assented to it by his silence. It is understandable that a criminal defendant, not necessarily familiar with all of his constitutional rights, and not informed of the same by

> the trial judge when the dual representation became apparent, might not interrupt his trial to request that his attorney be relieved even if he was made aware during the course of the trial that a prosecution witness was a client of his attorney."

Significantly, at no time either prior or subsequent to the commencement of trial proceedings did the trial judge in the case at bar conduct any inquiry whatsoever of Petitioner (App. D). Absent such inquiry by the trial judge, waiver cannot possibly be determined, much less presumed. In *Campbell v. United States*, 352 F.2d 359 (D.C. 1965), the court considered the problem as exemplified in a situation of one lawyer and two defendants, and therein held:

> "We have also noted that defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest. Wynn v. United States, 107 U.S. App. D.C. 190, 191, 275 F.2d 648, 649 (1960). And the Supreme Court has stated that the trial judge bears 'the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused,' specifically the right to effective assistance of counsel. Glasser v. United States, 315 U.S. at 71, 62 S.Ct. at 465. The judge's responsibility is not necessarily discharged by simply accepting the co-defendant's designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be de-

> termined, absent inquiry by the trial judge, whether the attorney had made such an appraisal or has advised his clients of the risks. Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel."

A somewhat similar situation to that presented in the case at bar appeared in *Government of the Virgin Islands v. John*, 447 F.2d 69, 74, 75 (3rd Cir. 1971), where the court noted that prejudice due to conflicting interests of counsel became apparent after the commencement of trial proceedings, as follows:

> "The record affirmatively establishes that neither defendants' counsel, the prosecutor nor the trial judge at any time during the trial gave any consideration to the rights of the defendants to "untrammeled and effective representation of counsel', although existence of the conflicting interests of the defendants became apparent when John's pre-trial statement implicating his co-defendants was introduced into the evidence by Government."

The court in such instance went on to say:

> "A defendant is constitutionally entitled to the 'untrammeled and unimpaired' assistance of counsel" for his defense; the right to such as-

> sistance is breached when a defendant's counsel simultaneously represents a co-defendant or co-defendants with 'conflicting interests' or '[i]rrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness;' the right may be "affirmatively waived' but the waiver must be knowingly and intentionally made, and a trial judge is charged with the 'serious and weighty responsibility' 'of determining whether there is an intelligent and competent waiver by the accused;' in doing so the trial judge is to 'indulge every reasonable presumption against the waiver;' and if the trial judge determines that 'proper waiver' has been made, that determination should appear upon the record."

It is submitted that the waiver of one's right to effective assistance of counsel is no less important than the waiver of one's right to counsel and, in either, the record should affirmatively demonstrate that any such waiver was knowingly and intelligently made. In accordingly requiring the record to demonstrate waiver, this Honorable Court, in *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884 (1962), held:

> "*Presuming waiver from silent record is impermissible. The record must show,* or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

CONCLUSION

It is respectfully submitted that the prejudice resultant to the Petitioner in the case at bar, through no fault of his own, should make requisite the granting of a new trial. For all practical purposes, as result of the abrogation by the trial court of its own court-approved stipulation, the Petitioner was precluded from the effective assistance of counsel to which he was constitutionally entitled. Petitioner has never waived such right, nor does the record support any inference or presumption thereof.

For the reasons herein assigned, the decision of the Fifth Circuit in the case at bar is submitted as being in conflict with the decisions of other courts of appeal, as well as with the applicable decisions of this Court. It is further suggested that the questions raised by the Petitioner herein reflect upon important questions of federal law which should be settled by this Honorable Court.

Petitioner, therefore, respectfully urges this Honorable Court to grant a Petition for Writ of Certiorari in the within cause.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to the Office of the Solicitor General, Washington, D.C., and to the Office of the United States Attorney, Ainsley Building, Miami, Florida, this 5th day of August, 1972.

LOUIS VERNELL